

## **IX. CONSULTATIVE REPORT ON QWEST PERFORMANCE ASSURANCE PLAN.**

This portion of the report addresses issues concerning Qwest's Performance Assurance Plan ("QPAP"). The record on these issues was developed through workshops and written filings including testimony, comments and briefs. The NDPSC also held a formal hearing on the issues.

On June 20, 2000, the NDPSC passed a motion in this proceeding to participate in a regional workshop to develop a post-entry performance assurance plan for Qwest. On August 9, 2000, eleven states formed the post-entry performance assurance plan (PEPP) collaborative and on August 14, 2000, the NDPSC issued its Notice of Opportunity to Participate in Multistate Workshops inviting interested persons to intervene in Case No. PU-314-97-193 and participate in the PEPP collaborative. The statistical methods and payment structure of the Texas PAP served as the starting point for the PEPP collaborative. After a workshop held in Seattle on May 15-17, 2001, Qwest ended its participation in the PEPP. On June 29, 2001, Qwest filed its Performance Assurance Plan (QPAP) with the NDPSC. On July 11, 2001, the NDPSC issued its Third Supplemental Procedural Order incorporating consideration of the QPAP into the multistate 271 collaborative. On September 19, 2001, the NDPSC issued its Fourth Supplemental Procedural Order making changes to the schedule of events.

After it appeared in May 2001 that further collaborative efforts were in doubt, the seven state commissions then participating in the multistate 271 collaborative, including North Dakota, participated in a proceeding to evaluate and obtain a recommendation on the QPAP ("new PEPP multistate collaborative"). Qwest submitted its QPAP and supporting documents to the facilitator, Liberty Consulting Group, followed by hearings held during the weeks of August 13 and August 27, 2001.

Following two rounds of briefing after the hearings, the facilitator filed its report on the QPAP on October 22, 2001. The report addresses the issues raised by the parties regarding the QPAP and contains the facilitator's recommendations and determinations on those issues. On November 2, 2001, comments on the QPAP report were filed by Qwest, AT&T Communications of the Midwest, Inc. ("AT&T"), Covad Communication Company ("Covad") and WorldCom, Inc.

On October 15, 2001, the NDPSC issued a Notice of Hearing to consider unresolved issues related to the QPAP. The hearing was scheduled for November 8, 2001. The hearing was subsequently continued at the request of AT&T and rescheduled for January 28, 2002. A formal hearing was held as scheduled commencing on January 28, 2002, in the Commission Hearing Room, State Capitol, 12<sup>th</sup> Floor, Bismarck, North Dakota. The NDPSC's notice stated it would consider

issues left unresolved in the final workshop on the QPAP and that had not been deferred to another portion of the Section 271 compliance investigation.

Qwest and AT&T appeared at the hearing and presented oral argument on the issues for which AT&T filed comment to the QPAP Report. Qwest also presented testimony and evidence regarding the QPAP Report on all remaining issues.

On February 1, 2002 Qwest filed a Summary of Mock QPAP Payments to show estimates of mock aggregate Tier 1 and Tier 2 payments based on the QPAP filed with Qwest's comments on the multistate Final Report.

On February 4, 2002 AT&T filed a Statement of Supplemental Authority concerning a 36% cap and included copies of the January 30, 2002 Wyoming Public Service Commission's First Order on Group 5A Issues and the Public Service Commission of the State of Montana's February 4, 2002 Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings.

On February 21, 2002 Qwest filed a Response to AT&T's February 1, 2002 Statement of Supplemental Authority.

On February 15, 2002, Qwest filed a Post-Hearing Memorandum on the QPAP issues.

On March 1, 2002 Qwest filed a North Dakota Mock Payment Report.

On April 2, 2002 AT&T filed a Reply to Qwest's Response to AT&T's Statement of Supplemental Authority Regarding QPAP and included a copy of the March 27, 2002 Wyoming Public Service Commission Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure.

On April 4, 2002 Qwest filed a Supplemental Post-Hearing Memorandum Regarding the QPAP and included a copy of QPAP revisions pursuant to a stipulation between Qwest and the Utah Advocacy staff that would be proposed to the Public Service Commission of Utah.

On April 12, 2002 AT&T filed a Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan and included a copy of the Thirteenth Supplemental Order of the Washington Utilities and Transportation Commission issued April 5, 2002.

On April 22, 2002 the NDPSC received a copy of the Reply Comments of Advocacy Staff for the Public Service Commission of Utah Regarding the Qwest Performance Assurance Plan Stipulation Between Advocacy Staff and Qwest.

On April 24, 2002 AT&T filed an Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan and included copies of the April 19,

2002 Public Service Commission of the State of Montana Final Report on Qwest's Performance Assurance Plan and Responses to Comments Received on Preliminary Report and the March 27, 2002 Public Utilities Commission of the State of Colorado Decision on Remand and Other Issues Pertaining to the Colorado Performance Assurance Plan.

On May 1, 2002 Qwest filed a North Dakota Mock Payment Report.

On May 3, 2002 AT&T filed an Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan and included a copy of the April 23, 2002 Nebraska Public Service Commission's order on the proposed QPAP for Nebraska.

On May 6, 2002 Qwest filed a Supplemental Memorandum on QPAP Issues.

On May 8, 2002 AT&T filed a Response to Qwest's May 6, 2002 Supplemental Memorandum.

Also on May 8, 2002, Qwest filed a Reply to AT&T's Response to Qwest's Supplemental Memorandum.

On May 9, 2002 AT&T filed an Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan and included a graph/summary of Commission/Board QPAP orders as of May 8, 2002, and included a copy of the May 7, 2002 Iowa Utilities Board Conditional Statement Regarding Qwest Performance Assurance Plan.

As requested by the NDPSC at its May 9, 2002 worksession, both parties submitted proposed language for QPAP sections 13.5 to 13.7, 12.1, 15.2, and 16.1. The proposals were discussed at the NDPSC's May 20, 2002 Informal Hearing.

On May 17, 2002 AT&T filed an Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan regarding control of future changes to the QPAP.

On May 21, 2002 AT&T filed an Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan and included a copy of the May 20, 2002 Washington Utilities and Transportation Commission 33<sup>rd</sup> Supplemental Order; Order Denying in Part, and Granting in Part, Qwest's Petition for Reconsideration of the 30<sup>th</sup> Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan.

The following is the NDPSC's Consultative Report on QPAP Issues.

## A. Background

A Performance Assurance Plan (PAP) is designed to ensure that, after the BOC enters the interLATA market, there is a mechanism in place to ensure that it does not "backslide" from the level of performance found to be satisfactory by the FCC in approving the checklist demonstration provided in the 271 application. The FCC has indicated that "the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority."<sup>146</sup> Qwest states that the FCC has never required Bell Operating Company applicants to demonstrate that they are subject to performance monitoring and enforcement mechanisms as a condition of section 271 approval and therefore Qwest is volunteering its PAP (QPAP).

Under the precedent established by the FCC in its prior Section 271 orders, the ultimate question in reviewing performance assurance plans proposed in support of an application for in-region interLATA authority is whether the plan lies within a "zone of reasonableness." The FCC set five general characteristics as part of its "zone of reasonableness" test for evaluating a section 271 performance assurance plan:

- Meaningful and significant incentive to comply with designated performance standards.
- Clearly articulated and predetermined measurements and standards encompassing a range of carrier-to-carrier performance.
- Reasonable structure designed to detect and sanction poor performance when and if it occurs.
- Self-executing mechanism that does not open the door unreasonably to litigation and appeal.
- Reasonable assurance that the reported data are accurate.

The facilitator found that the QPAP adopts the two-tiered Texas payment approach, under which Tier 1 payments go to CLECs and Tier 2 payments go to the states. The QPAP changes the Texas approach by adding to the payment escalation method (for consecutive months of missed performance) a corresponding stepped de-escalation process. The QPAP also eliminates the Texas plan payment caps on individual performance measures (except billing), restructures collocation payments, and raises Tier 1 performance measures classified as "medium" to "high." The QPAP differs from the Texas Plan in a number of other respects as well.

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<sup>146</sup> Memorandum Opinion and Order, *Application of Verizon Pennsylvania for Authorization to Provide In-Region, InterLATA Service in Pennsylvania*, CC Docket No. 01-138, FCC 01-269 ¶¶127-128 (2001) ("Verizon Pennsylvania Order").

The facilitator recommended the ultimate decision on the QPAP's sufficiency, should take into account the following considerations:

- Does it comport with the cornerstone elements common to previous plans existing under approved 271 applications
- Do the gives and takes that distinguish it from those other plans balance out on a net basis
- Does the plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity
- In the final analysis, will the plan (considering not just those elements designed to compensate CLECs for harm) provide sufficient incentive for Qwest to "continue to satisfy the requirements of Section 271 after entering the long distance market," as the FCC put it in paragraph 275 of the SBC Kansas/Oklahoma Order, after it may receive 271 approval
- Will the plan provide that incentive in a manner that does not place any more strain than is necessary on the sound principle that damages should bear a reasonable relationship to harm caused
- Do the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, InterLATA entry that it would be irrational for a BOC to pay for the privilege of such entry, recognizing that the range of expected values of potential payments, not a theoretical maximum with minimal likelihood of occurring, is much more meaningful
- Does the plan adequately respond to any unique circumstances proven by the evidence to be applicable here
- Are there administrative or procedural details in the plan that are not sufficiently functional, and that can be repaired without a major shift in balance

We note that the Washington Utilities and Transportation Commission has found that "the Facilitator correctly stated the five prongs of the FCC's zone of reasonableness test, but went too far in stating his own "considerations" for review of Qwest's QPAP and his comments on increasing Qwest's incentives." "We find that the FCC's "zone of reasonableness" test is the most appropriate in determining whether Qwest's proposed plan, as modified by the Facilitator, is sufficient to deter and enforce backsliding behavior and whether any of the changes proposed by the CLECs are necessary."

## **B. Analysis of Evidence**

### **1. Meaningful and Significant Incentive**

Qwest is offering the QPAP to CLECs, and a CLEC must accept the QPAP in its entirety, all or nothing. Therefore, for CLECs that choose the QPAP, Qwest is offering some assurance that it will not “backslide” from the level of performance, but for CLECs that do not choose the QPAP, Qwest is offering no assurance that it will not “backslide.”

#### ***a. Total Payment Liability***

##### ***(i) The 36% of Net Revenues Standard***

The QPAP includes a cap on total payments made by Qwest for a calendar year for the state. The cap places at risk 36% of Qwest’s 1999 ARMIS net return for local services. For North Dakota, 36% of Qwest’s 1999 ARMIS net return for local services is \$13 million. The ARMIS net return is measured as total operating revenue less operating expenses and operating taxes.

ELI/Time Warner/XO Utah argued against the QPAP’s adoption of the 36% cap, citing several grounds, which included:

- That this figure was not comparable to the caps in the PAPs of other BOCS, because the QPAP is much more favorable to Qwest in other respects.
- That the 36% figure is less than Qwest’s profits from intrastate service in Washington and Utah, which would allow Qwest to continue profiting from local exchange service even after making payments at the cap.

ELI/Time Warner/XO Utah said that a small market share in the in-region, InterLATA market (i.e., less even than the 25 percent that Verizon initially captured in New York), would justify surrendering 36% of its other net revenues to protect its local exchange market from competition.

AT&T argued that Qwest’s reliance upon the FCC’s acceptance of the 36% total payout in other proceedings was misplaced. AT&T said that Qwest’s commitment to the 36% amount was undercut by many other self-serving changes Qwest had made in other material provisions of the plans accepted in those proceedings, citing specifically the following QPAP provisions:

- Broad offset provisions
- Broad exclusion provisions
- Limits on use of dispute resolution procedures
- Tier 2 payment limitations
- Lower late report payments
- Six-month PAP review

- Narrow audit provisions

The facilitator found that the participating CLECs raised only general objections to the use of a 36% cap and that such general objections cannot stand against the growing weight of decisions by the FCC, which has apparently considered similar objections already. The facilitator concluded the 36% cap is an appropriate starting point which needs to be examined again as all of the other QPAP provisions affecting Qwest's incentive to perform are addressed.

AT&T, Z-Tel, and WorldCom supported the adoption of a procedural rather than an absolute or "hard" cap. The facilitator recommended that a procedural cap that leaves others free to escalate without limit the risk that Qwest must take in entering the in-region interLATA market makes a decision to enter the market much more speculative than it need or should be. The concerns of those who make the decisions, which include not only Qwest but also its investors, must be taken into account. The facilitator analyzed there is no established foundation for including in the QPAP a re-opener of the question of how much total economic risk Qwest should be exposed to as a condition of its in-region, interLATA market entry.

The facilitator found merit in a proposal by WorldCom, although not offered in that form, that allowed an increase in the 36% cap to a 44% cap as a targeted and measured increase, as opposed to the unlimited one generally proposed by the CLECs. The facilitator believed that signaling the amount of an increase in exposure, accompanied by a clear and complete statement of the conditions that cause it, could better serve to provide appropriate incentives without making business entry decisions unduly speculative. Accordingly, the facilitator considered it prudent to consider the possibility of allowing movement of the cap within a reasonably confined range and for a defined set of circumstances. The facilitator recommended the inclusion of the following cap movement principles in the QPAP:

- A. *An increase in the cap of a maximum of 4 percentage points at any one time (i.e. first to 40 percent) shall occur upon order by a state commission that it is appropriate to do so in cases where the cap would have been exceeded for any consecutive period of 24 months by that same 4 percent or more provided that:*
  - a. *the commission shall determine that the preponderance of the evidence shows Qwest could have remained beneath the cap through reasonable and prudent efforts, and*
  - b. *the commission shall have made that determination after*
    - 1. *having available to it on the record the results of root cause analyses, and*
    - 2. *providing an opportunity for Qwest to be heard.*

- B. *A decrease in the cap of a maximum of 4 percentage points at any one time shall occur upon order by a state commission that it is appropriate to do so after performance for any consecutive period of 24 months which produces calculations of total payment responsibility that is 8 or more percentage points (i.e., 26 percent or less) below the cap amount for that period, provided that:*
- a. *the commission shall determine that the preponderance of the evidence shows the performance results underlying those payment calculations results from an adequate Qwest commitment to meeting its responsibilities to provide adequate wholesale services and to keeping open its local markets, and*
  - b. *the commission shall have made that determination after providing all interested parties an opportunity to be heard.*
- C. *The provisions of (A) and (B) above shall be applicable to the next 24 month period commencing at the completion of the first, provided that the maximum increase in the cap amount shall be 8 percentage points; the maximum decrease shall be 6 points.*

The NDPSC recommends a somewhat modified version of the facilitator's recommendation and recommends the QPAP be revised as follows:

*12.2 The 36 percent annual cap may increase to 44 percent of ARMIS Net Return as follows:*

*12.2.1 An increase in the "existing annual cap" of 4 percentage points at any one time (i.e. first to 40 percent then to 44 percent) shall occur in cases where the cap would have been exceeded for any consecutive period of 24 months by that same 4 percent or more. Qwest may file a petition with the NDPSC seeking relief for payments exceeding the existing annual cap. Qwest will not be required to make payments in excess of the existing annual cap pending the outcome of the proceeding before the Commission. Qwest shall have the burden of establishing that it could not have remained below the existing annual cap through use of reasonable and prudent effort. If the Commission determines that Qwest should make payments in excess of the existing annual cap, Qwest shall make any and all payments that were suspended with interest.*

*12.2.2 A decrease in the existing annual cap of a maximum of 4 percentage points at any one time shall occur upon order by the Commission that it is appropriate to do so after performance for any consecutive period of 24 months which produces calculations of total payment responsibility that is 8 or more percentage points (i.e., 26 percent or less) below the cap amount for that period, provided that:*

a. the commission shall determine that the preponderance of the Qwest evidence shows the performance results underlying those payment calculations results from an adequate Qwest commitment to meeting its responsibilities to provide adequate wholesale services and to keeping open its local markets, and

b. the commission shall have made that determination after providing all interested parties an opportunity to be heard.

12.2.3 The provisions of 12.2.1 and 12.2.2 shall be applicable to the next 24-month period commencing at the completion of the first, provided that the maximum annual cap shall be 44 percent; the minimum annual cap shall be 36 percent.

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to these QPAP sections as recommended by the NDPSC.

**(ii) Equalization of Payments to CLECs**

The facilitator determined that in years where the cap may be exceeded, the QPAP could operate severely and unfairly against CLECs who suffer disproportionately from Qwest under performance late in the year. When the cap is reached, CLECs who have already suffered harm are compensated fully; those yet to suffer harm will not be compensated at all. The facilitator recommended that when the cap is reached, each CLEC should, at the end of the year, be entitled to receive the same percentage of its total calculated Tier 1 payments. To preserve the operation of the cap, the facilitator recommended the percentage equalization should take place as follows:

1. The amount by which any month's total payments exceeded 1/12th of the annual cap shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments of the year to date. The result of this calculation shall be known as the "Tracking Account."
2. The Tier 1 excess shall be debited against the next ensuing payments due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.
3. The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

This calculation should take place in the first month that payments are expected to exceed the annual cap and for each month of that year thereafter. Qwest would recover any debited amounts by reducing payments due for any CLEC for that and any succeeding months, as necessary.

The NDPSC agrees with the concept of percentage equalization of Tier 1 payments in order to provide the same percentage of total calculated Tier 1 payments that each CLEC is entitled to for a given year. The NDPSC finds that Qwest has incorporated the facilitator's proposal in QPAP sections 12.3, 12.3.1, 12.3.2, 12.3.3, and 12.3.4. The NDPSC makes a recommended change only to QPAP section 12.3.1 to be consistent with the NDPSC recommendation concerning the cap:

*12.3.1 The amount by which any month's total year-to-date Tier 1 and Tier 2 payments exceeds the sum of the year-to-date monthly caps (a month's cap is defined as 1/12<sup>th</sup> of the annual cap in effect during that month) shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for the year-to-date. The Tier 1 apportionment resulting of this calculation shall be known as the "Tracking Account."*

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Section 12.3.1 as recommended by the NDPSC.

### ***(iii) Qwest's Marginal Cost of Compliance***

A number of participants supported the argument that one way to examine the propriety of a firm payment cap would be to compare: (a) Qwest's marginal cost of complying with the performance standards against (b) the payments to which it would be exposed for not complying. Qwest argued that there is no evidence to show that its marginal cost of compliance is greater than 36% of its net revenues. Moreover, Qwest said the FCC has rejected the notion that such a balancing is appropriate in the first place.

Although finding theoretical appeal in the marginal cost analysis, the facilitator concluded there were a number of insurmountable problems in applying it. Thus, while the proffered equation had theoretical appeal, the facilitator recommended it was not a solution here because there was no evidence to enable its use.

The NDPSC previously addressed the issue of payment cap and agrees with the facilitator's conclusions and findings concerning the use of marginal cost analysis to determine the firm payment cap.

### ***(iv) Continuing Propriety of a Cap Based on 1999 Net Revenues***

Some CLECs also criticized the freezing of the cap amounts that would result from continuing to use 1999 net revenues into the future.

The facilitator found, however, that there was no reason to conclude that the ongoing use of 1999 net intrastate revenues is more likely to increase or decrease Qwest's net financial exposure. The facilitator recommended that it was preferable to

rely upon the firm dollar amounts that the QPAP provides for, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

Covad stated that continuing to use 1999 net revenues into the future fails to capture post Qwest-US WEST merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant". The NDPSC recommends the annual cap percentage determined under QPAP sections 12.1 and 12.2 and associated subsections be applied to the company's most recently reported ARMIS Net Return to determine the dollar amount of the annual cap.

Therefore the NDPSC recommends that current QPAP section 12.1 be replaced as follows:

*12.1 There shall be an annual cap on the total payments made by Qwest beginning with the effective date of the PAP for the State of North Dakota. The annual cap, beginning with the effective date of the PAP for the State of North Dakota, shall be 36 percent of the 1999 ARMIS Net Return (which is \$13,000,000). Subsequent annual caps determined pursuant to section 12.2 and its subsections are expressed as a percent and are applied to Qwest's most recently reported ARMIS Net Return to determine the dollar amount of the annual cap. CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of any Tier-1 liquidated damages (including any such damages paid pursuant to this Agreement or voluntary payments made by Qwest pursuant to any North Dakota interconnection agreement with a performance remedy plan) and Tier-2 Assessments or voluntary payments made by Qwest pursuant to any North Dakota interconnection agreement with a performance remedy plan.*

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Section 12.1 as recommended by the NDPSC.

#### **(v) Likely Payments in Low Volume States**

The New Mexico Advocacy Staff questioned the importance to be placed on the total cap amount in its state, arguing that very low CLEC local-exchange-service business volumes would make it impossible to generate payments at or near the New Mexico limit.

The facilitator recommended that if low CLEC order volumes compromise the reason that the cap would not be reached, then a higher hard cap or a procedural cap would be unresponsive. Those higher triggers would not be met either. The facilitator recommended that the QPAP's provisions for minimum payments, discussed below, are

the direct way to address the New Mexico Advocacy Staff's concern about how low order volumes might dilute the compensatory and incentive goals of the QPAP.

The NDPSC agrees with the facilitator's conclusions concerning low order volumes.

**(vi) Deductibility of Payments**

WorldCom questioned whether we should find comfort in the cap's adequacy in light of the fact that Qwest may be able to deduct payments for income tax purposes. WorldCom suggested that the payments should be declared penalties in order to make them non-deductible by Qwest.

The facilitator saw no reason unique to Qwest that would justify a tax-netting factor here that was different than the prior plans considered by the FCC. The facilitator concluded that the taxability of the payments would be determined based upon the nature of the payment rather than what it is called.

The NDPSC agrees with the facilitator's conclusions concerning taxability of payments.

**b. Magnitude of QPAP Payout Levels**

Equally important to the total economic exposure to Qwest from the QPAP, is the question of what level of event-specific payments apply. Qwest presented an analysis of the payments the QPAP would have produced for the months of February through May 2001, on the basis of the assumption that the QPAP had been in effect for at least six months prior to that February. The calculations showed that payments would have been equivalent to years of free service for CLECs. Qwest measured its overall performance level under the applicable performance measures at 92% during this period. By this analysis, Qwest attempted to show that the payments received by CLECs under the QPAP were an adequate measure of compensation based upon the assumption that the prices CLECs pay for service reflect a relevant measure of the value of the services. Qwest also presented analysis of the combined Tier 1 and Tier 2 payments that it would have made for the 2001 months of February through May for unbundled loops and coordinated cuts. Qwest's analysis showed that its QPAP payments for those measures would have exceeded the total revenue it would have received for the services measured by them. Qwest also noted that although individual payments were significant in their own right, it was also necessary to recognize that the same order or activity could produce multiple payments. Thus, even if there was concern that the payments for an individual measure were insufficient to compensate CLECs for damages, the QPAP's provision of multiple payment opportunities for the same activity or closely related activities provided additional compensation.

The CLECs attacked Qwest's analysis for a variety of reasons.

The facilitator determined the arguments made against the relevance or the accuracy of Qwest's calculations were inapplicable or incorrect. The presumed payments were modeled for a historical period of time during which payments were not required and therefore they obviously could not have motivated performance as they might have if they were payable. The facilitator also accepted that causally linked payment opportunities and resultant increases in payment levels are proper to assume. Qwest's analysis was also correct that the proper base for assessing overall exposure is, as the FCC appears repeatedly to have accepted, intrastate net revenues rather than consolidated Qwest net incomes.

The facilitator determined that Qwest's analysis showed that its costs of noncompliance would be substantial under a fully operational and mature QPAP. The evidence was useful, its intent and characteristics were overtly demonstrated, and its application of memory was appropriate to the use that the sponsor intended.

The NDPSC agrees with the facilitator's determination.

### ***c. Compensation for CLEC Damages***

#### ***(i) Relevance of Compensation as a QPAP Goal***

In the multistate workshops, Z-Tel discounted the relevance of a goal of compensating CLECs for damages incurred as a result of noncompliant Qwest wholesale performance. Other participants at least implicitly made the sufficiency of the QPAP to compensate CLECs for harm they suffered a matter of interest to these proceedings.

The facilitator determined there is sound reason for addressing the recovery of traditional damages together with the inducement features of a QPAP. State public service commissions, the FCC, and CLECs all recognize the compensatory nature and the liquidated damages elements of performance assurance plans. The facilitator recommended it is appropriate for the QPAP to address the question of compensating CLECs for contractual damages, and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely, and given that the QPAP payments approximate such damages. A central feature of this QPAP, like others before it, is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship.

The NDPSC recommends that the QPAP, as modified by all recommendations of the NDPSC, represents suitable compensation.

### ***(ii) Evidence of Harm to CLECs***

Covad argued that a cap would necessarily leave CLECs less than whole for the harm they suffer from Qwest's conduct. WorldCom said that Qwest's analysis failed to include the loss of profits realized by CLECs when other services were bundled or when customers had more than one line. AT&T noted that intangible CLEC losses were impossible to quantify and therefore should not be limited. Qwest replied generally that the CLECs failed to support their arguments that Tier 1 payments did not compensate them sufficiently and that there was no CLEC evidence about the expense or investments they incurred due to poor Qwest performance.

The facilitator noted that while there was extensive criticism of Qwest's attempt to relate QPAP payments to the level of damage or harm suffered by CLECs as a result of poor Qwest performance, the CLECs did not present substantial evidence to show what their damages had been or would be. Because such damages will prove no easier to quantify after the fact or by some other trier of fact, they fit precisely the kinds of liquidation needs for which such damage provisions are intended. The question remains, however, whether the QPAP payments represent a reasonable approximation of the harm that CLECs suffer. Qwest's principle evidence was an approximate equation of service price with service value. Faced with the lack of a CLEC presentation of their own quantification of lost profit and other harm for comparison to the QPAP payments, the facilitator concluded that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. The facilitator also noted that any particular CLEC that decides the QPAP payments are insufficient retains the opportunity to choose not to elect them.

The NDPSC agrees with the facilitator that there was a lack of CLEC evidence to show what their damages had been or would be. The NDPSC recommends that the QPAP, as modified by all recommendations of the NDPSC, represents sufficient compensation.

### ***(iii) Preclusion of Other CLEC Remedies***

Sections 13.5 and 13.6 of the QPAP state that if the CLEC adopts the PAP in its interconnection agreement with Qwest, then the PAP is adopted in its entirety and in lieu of other alternative standards or relief. In no event is the CLEC entitled to remedies under both the PAP and other rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. Tier 1 payments are set as the exclusive remedy to compensate for damages resulting from Qwest service in fulfilling its wholesale performance obligations. Qwest is requiring that, in return for the right of Tier 1 payments without the necessity to prove them, other damages arising from the same, or analogous performance would be waived. Some CLECs argued that a CLEC should not be foreclosed from taking other remedies while AT&T argued that CLECs should be able to seek contract remedies, even after accepting PAP payments, in those cases where CLECs could demonstrate a

reasonable damage theory that would show that the PAP payments it received were not fully compensatory.

Qwest agreed the QPAP would not preclude CLEC claims based on non-contractual causes of action, nor would it limit federal enforcement of actions under Section 271(d)(6). Qwest stated, however, that the offset provisions of the QPAP, Section 13.7, would apply to non-contractual remedies.

The facilitator recommended that a provision that limits additional recovery under causes of action that sound in contract is reasonable as a means of precluding double recovery, while at the same time allowing for recovery of damages that result from other theories of liability, such as those grounded in tort or anti-trust law. Qwest's reply brief reflected a general commitment not to preclude noncontractual actions. The facilitator, however, found that Section 13.6 of the QPAP contains language that could be construed as contradictory to this commitment. The facilitator recommended the QPAP language should do the following:

- Prohibit all causes of action based on contractual theories of liabilities.
- Prohibit the recovery of amounts related to the harm compensable under the contractual theories of liability under noncontractual causes of action that also permit the recovery of damages recoverable under contractual theories of liability.
- Allow for the recovery under noncontractual theories of liability those portions of damages allowed by the applicable theory that are not recoverable under contractual theories of liability.

To accomplish this recommendation, the facilitator recommended that all quoted portions of Section 13.6 following the phrase "in its interconnection agreement with Qwest" should be stricken and replaced with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law; or (b) those available under the QPAP and other remedies as limited by the QPAP. Those limits are the bar on other contractual remedies and on double recovery.

AT&T recommended to the NDPSC that the following language be added to the QPAP:

*By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability. The application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and regulatory claims and remedies that may be available to the CLECs.*

At a worksession before the NDPSC on May 9, 2002, Qwest and AT&T agreed that the language in QPAP section 13.5 is acceptable and also agreed to language to replace QPAP section 13.6 as follows:

*13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief for the same wholesale services governed by the QPAP. Where alternative standards or remedies for Qwest wholesale services governed by the QPAP are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders, or contracts and CLECs choice of remedies shall be specified in its interconnection agreement.*

The NDPSC recommends the QPAP be revised to include the changes noted in this report on the issue of preclusion of other CLEC remedies.

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Section 13.6 as recommended by the NDPSC.

***(iv) Indemnity for CLEC Payments Under State Service Quality Standards***

AT&T proposed that Qwest compensate CLECs for any payments that CLECs must make for failing to meet state or federal service quality rules, provided Qwest's wholesale service deficiencies cause the CLEC failures. Other CLECs noted that the issue of Qwest's indemnity for CLEC payments for failing to meet state service quality standards was addressed earlier in these workshops. Some of the CLECs sought assurance that the QPAP not preclude indemnification.

Qwest objected to an added requirement that it compensate CLECs for assessments that state commissions make against CLECs for violating state service quality standards.

The facilitator concluded the merits of requiring indemnification were fully addressed in prior workshops and there was sufficient justification for precluding such indemnity in the QPAP, as it was precluded elsewhere in the SGAT.

The NDPSC agrees with the facilitator's conclusion and recommendation.

***(v) Offset Provision Section (13.7)***

Section 13.7 of the QPAP allows for the offset of QPAP payments from compensatory damages awarded to a CLEC by a court or regulatory authority for the same or analogous wholesale performance covered by the QPAP. Section 13.7 allows Qwest to reduce such an award where payments made are due to such CLEC under the QPAP. AT&T objected to this provision because the FCC has not allowed a BOC a

unilateral right to make an offset and that the right of an offset is the province of the finder of fact under common law and that there was confusion about the intent of the language regarding "analogous performance." Other CLECs joined in AT&T's arguments.

The facilitator determined that Qwest does not have the unilateral right to offset QPAP payments because the QPAP's dispute resolution provisions provide an adequate opportunity to challenge a decision by Qwest to reduce its QPAP payments under the offset language. Adequate interest provisions address any time value of money issues associated with delays in payments while disputes get resolved.

AT&T would prefer that the issue of offsets be resolved by the authority that assesses "damages" that are similar to or parallel with payments due under the QPAP. Where such damages were assessed by a judicial authority, the facilitator recommended that the Commission, which is much more familiar with the goals and features of the QPAP, should make the decision of offset rather than the judicial authority which presumably is much less familiar with the QPAP's context, purpose and contents to decide how its intent can best be implemented in the circumstances.

The facilitator determined that although Qwest's revised language limits the offset provisions to the portion of damages that represent compensatory recovery by CLECs, the language nonetheless remained confusing in its use of the terms "analogous" and "performance." The facilitator recommended there should be consistency between the language allowing other damages and the language addressing offsets. Accordingly, the facilitator recommended that changing the phrase "same or analogous wholesale performance" to "same underlying activity or omission for which Tier 1 assessments are made under this QPAP" would solve the problem.

The facilitator also determined that because the QPAP has nothing to do with compensation for physical property damage or personal injury, it is necessary to preserve other SGAT provisions recommended in an earlier report that do address such compensation. Therefore, the facilitator recommended that QPAP Section 13.7 should contain a provision stating that:

*Nothing in this QPAP shall be read as permitting an offset related to Qwest's payments related to CLEC or third party physical damage to property or personal injury.*

AT&T asserts that, while double recovery for the same damages is not allowed by the judicial system, the concept of offset is a judicial concept and it is the decision maker that must assure an aggrieved party does not receive double recovery. AT&T states that neither the Texas PAP, the Colorado CPAP nor the Utah Advisory Staff Report precludes Qwest from arguing for offset in the relevant court of law. AT&T quotes the Texas PAP section 6.3 as saying "whether or not the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant

proceeding," not unilaterally by Qwest in the QPAP. AT&T proposes that the QPAP section 13.7 be edited as follows:

*13.7 Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payment against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the related proceeding.*

In its May 6, 2002 memorandum to the NDPSC Qwest stated it does not object to the language proposed by AT&T. The NDPSC recommends that the QPAP section 13.7 regarding offsets be changed to the language proposed by AT&T.

At the NDPSC May 20, 2002 Informal Hearing, Qwest and AT&T agreed to language to replace QPAP section 13.7 as follows:

*13.7 Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.*

The NDPSC recommends the QPAP be revised to include the changes noted in this report on the issue of offset provisions.

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Section 13.7 as recommended by the NDPSC.

#### **(vi) Exclusions (Section 13.3)**

QPAP Section 13.3 contains a list of circumstances that excuses Qwest from Tier 1 and Tier 2 payments in the event that certain listed events occur. Those events include "CLEC bad faith" which exclusion the CLECs sought to strike while Qwest argued it was appropriate to protect against actions that have the "foreseeable effect of causing Qwest to miss a performance standard." CLECs also argued that the QPAP should refer to Section 15.7 of the SGAT regarding *force majeure* events rather than setting forth a broader *force majeure* exclusion which could weaken the standards set forth in the SGAT. AT&T requested the inclusion of a specific reference to the Commission's authority to resolve disputes regarding determination of whether Qwest had met its burden to show that non-performance under the QPAP resulted from an allowable exclusion. AT&T would also add language explicitly requiring the demonstration of a nexus between an allowable *force majeure* event and Qwest's performance, requiring further that the event render performance by Qwest

"impossible." AT&T further argued that *force majeure* should not be an excuse for failing to meet parity measures, because Qwest should still be able to meet the parity standard, which is that CLEC service be no worse. Finally, WorldCom and Covad would limit the exclusion for CLEC failures to forecast to failures to provide those forecasts required by the SGAT.

The facilitator determined there was merit in the inclusion of the QPAP provision regarding "CLEC bad faith." The facilitator, however, recommended the insertion of the following provision in QPAP Section 13.3 to assure there is not a material dilution of the operation of the QPAP as a meaningful and significant incentive to Qwest:

*Notwithstanding any other provision of this QPAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.*

The facilitator recommended that there should not be a separate and different *force majeure* provision in the QPAP from that in the SGAT. Rather, there should be a simple replacement of clause (1) of QPAP Section 13.3 with the following phrase: "a *Force Majeure* event is defined in Section 5.7 of the SGAT." The facilitator recommended that Qwest's approach, that the Public Service Commission be the resolver of disputes regarding Qwest's determination of a *force majeure* event, is appropriate. The facilitator recommended, however, that Qwest should be required by the QPAP to provide notice of its claims of the occurrence of *force majeure* events within 72 hours of learning of them, or after it reasonably should have learned of them. The facilitator found there is already a clear requirement that a *force majeure* event be the cause of a failure of Qwest's performance, but that the AT&T language specifying the method for calculating the impact of a *force majeure* event on interval measures should be added to clarify the method for calculating QPAP payments when a *force majeure* event should have less than a completely excusing impact. The facilitator also determined that parity requires that parity measures not be subject to *force majeure* payment exclusions. The exclusion for failure to forecast should be limited to the failure to provide properly those forecasts that are "explicitly required by the SGAT" of which the QPAP will form a part.

The NDSPC agrees with the facilitator's determinations and recommendations regarding exclusions and finds that Qwest has made the recommended revisions to QPAP section 13.3 and its subsections.

***(vii) SGAT Limitation of Liability to Total Amounts Charged to CLECs***

Some CLECs noted that SGAT Section 5.8.1 limits Qwest and CLEC total liability (except for willfulness conduct) for the total amount charged under the SGAT for the applicable year. This SGAT provision expressly does not limit QPAP payments;

however, nothing provides that QPAP payments do not limit the other damages, to which this section applies.

The facilitator concluded that the payments addressed by SGAT Section 5.8.1 and by the QPAP are mutually exclusive. Qwest's liability for property damage and personal injury should not be limited by QPAP payments, just as QPAP payments should not be limited by payments for property damage and personal injury. Therefore, the facilitator recommended SGAT Section 5.8.1 should include a provision stating that:

*payment pursuant to the QPAP should not be counted against the limit provided for in this SGAT section.*

The NDSPC agrees with the facilitator's determinations and recommendations regarding exclusions and finds that Qwest has made the recommended revision to SGAT section 5.8.1 in the Qwest North Dakota SGAT Third Revision dated December 14, 2001.

#### **d. Incentive to Perform**

##### **(i) Tier 1 and Tier 2 Payments and Funds**

AT&T urged the elimination of the QPAP Section 7.5 requirement that Tier 2 payments be limited to use for purposes that relate to the Qwest service territory.

The facilitator determined the proper construction of the Qwest language is that the restriction applies only to payment amounts to be administered by the Commission. Should the Commission administer those funds, the restriction is generally appropriate given the statutory role that commissions typically have. The facilitator recommended, however, that there should be no restrictions on payments made to the general fund. Therefore the facilitator recommended QPAP Section 7.5 should be replaced with the following:

*Payment of Tier 2 Funds: payment to a state fund shall be used for any purpose determined by the commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided under state law.*

The facilitator also recommended that a portion of the Tier 2 payments and, if necessary, a fraction of the escalated portion of Tier 1 payments be used for the creation of a funding mechanism to support state commission activities. The QPAP should provide that one-fifth of the escalation portion of the payments otherwise due to CLECS for non-compliant service in each participating state and one-third of the state's Tier 2 payments be made to a special fund that would be available for states participating in a common administration effort to use for: (a) administrative activities; (b) dispute resolution; and (c) other wholesale telecommunications service activities

determined by the participating commissions to be best carried out on a common basis. The Tier 2 payments should be first used to carry out these purposes, with any excess remaining Tier 1 payments returned to the CLECs who made them, on a pro rata basis, not less than every two years. Qwest should also be required to make an advance payment against future Tier 2 obligations in an amount reasonably determined by the participating commissions to fund the proceeding listed activities on an interim basis.

QPAP Section 7.5 sets forth uses by the state of Tier 2 funds and the authority for the state to receive or administer Tier 2 payments. Since the NDPSC authority to administer funds is given by the North Dakota Legislature, the NDPSC recommends that the QPAP Section 7.5 be changed to the following:

7.5 Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the Commission that is allowed to it by state law. Until such time as the North Dakota Legislature determines the uses by the Commission of Tier 2 funds, Tier 2 payments shall be made to the ND Performance Assurance Fund as set forth in QPAP Section 11.3 and its subsections. Upon the effective date of legislation, the receipt and administration of Tier 2 funds shall be as directed by the North Dakota Legislature.

QPAP Section 11.3 and its subsections sets forth special funds to be created for the purposes of receiving and administering Tier 2 payments. Since NDPSC authority to administer funds is provided by the North Dakota Legislature, the NDPSC recommends that the QPAP Section 11.3 and its subsections be changed as follows:

11.3 A ND Performance Assurance Fund shall be created for the purpose of receiving Tier 2 payments. A ND CLEC Tier 1 Fund shall be created for the purpose of receiving Tier 1 payments made under section 11.3.1.

11.3.1 Qwest shall establish the ND Performance Assurance Fund and the ND CLEC Tier 1 Fund as interest bearing escrow accounts upon FCC section 271 approval of the PAP. Qwest shall withhold and deposit into the ND CLEC Tier 1 Fund one-fifth of all Tier 1 payments to CLECs that exceed the month 1 payment amounts in Table 2. Qwest shall deposit all Tier 2 payments into the ND Performance Assurance Fund. The cost of the escrow account will be paid for from account funds.

11.3.2 All charges against the funds shall be presented to the Commission. Disbursements shall first be from the ND Performance Assurance Fund and second from the ND CLEC Tier 1 Fund. Not less than every two years, ND CLEC Tier 1 Fund amounts that are not used to meet continuing obligations shall be returned on a pro-rata basis to CLECs.

11.3.3 Qwest shall advance, upon request, sufficient funds to any consolidated multistate Special Fund established by participating states, set up for the purpose of a regional audit as specified in sections 15.1-

15.4, not to exceed \$200,000 (of \$500,000 in the event 6 or more states participate in the regional audit) in order to meet initial claims against that fund to the extent that contributions from Tier 1 and/or Tier 2 payments directed to the fund by the participating states are insufficient. Qwest shall be allowed to recover any such advances plus interest from the fund at the rate that such an escrow account would have earned from future Tier 2 payments.

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to these QPAP sections as recommended by the NDPSC.

***(ii) Three Month Trigger for Tier 2 Payments***

The QPAP initially stated that Tier 2 payments are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value for three consecutive months. Qwest argued there were sound reasons why Tier 2 payments should, unlike Tier 1 payments, not begin in the first month including the lag involved in identifying continued problems and in taking steps to meet them. Qwest said this is identical to how Tier 2 payments work in the Texas, Oklahoma and Kansas plans.

AT&T argued that payments should begin after a single month of non-compliant performance in order to assure there are effective sanctions for poor performance on Tier 2 measures. In addition, as AT&T interprets the QPAP, there is no provision for escalation of Tier 2 payments.

The facilitator determined that one compliant month out of every three should not be considered adequate for measures that have no Tier 1 payment. The facilitator recommended that in any twelve-month rolling period in which there have been two non-compliant months out of any consecutive three months, payments for those Tier 2 payments without a Tier 1 payment obligation should be triggered by a single month of non-compliance. In the case of Tier 2 payments that have Tier 1 counterparts, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance, provided that the same two-out-of-three month condition, as recommended for Tier 2 measures that have no Tier 1 counterpart, is met.

In its post-hearing memorandum, Qwest proposed the following changes to QPAP Section 9.1.2 in response to the facilitator's recommendation and the Commission's request for clearer language than included in Qwest's compliance filing of the QPAP:

*Tier 2 payments shall be required with respect to the earlier of the following:*

- (a) *the third consecutive month in which Qwest misses the relevant Tier 2 measurement, or*
- (b)
  - (1) *for Tier 2 measurements that have no Tier 1 counterpart listed on Attachment 1, the first month in any twelve-month period in which Qwest misses the measurement, if Qwest has previously missed the measurement in any two of the three consecutive months during that same twelve-month period;*
  - (2) *for Tier 2 measurements that have such a Tier 1 counterpart, the second month in any twelve-month period in which Qwest misses the measurement, if Qwest has previously missed the measurement in any two of three consecutive months during that same twelve-month period.*

The Wyoming Public Service Commission has found that "the QPAP should detect and sanction poor performance when and if it occurs. Therefore, if certain poor performance violates the QPAP, the penalty should attach at once rather than after a period of time elapsed. We do not believe that a "meaningful" penalty is created when prohibited behavior is allowed to continue over a period of time before it is penalized."

The NDPSC recommends the following QPAP section 9.1.2:

*9.1.2 Tier 2 payments for performance measurements listed on Attachment 1 shall be made in the current month when 1) for Tier 2 measurements that have Tier 1 counterparts it is determined that Qwest missed the performance standard for a third month in any twelve-month period or 2) for Tier 2 measurements that do not have Tier 1 counterparts it is determined that Qwest missed the performance standard for a second month during any twelve-month period.*

The NDPSC finds that Qwest, in its North Dakota SGAT Sixth Revision dated May 30, 2002, has made the changes to QPAP Section 9.1.2 as recommended by the NDPSC.

### ***(iii) Limiting Escalation to 6 Months***

The QPAP provides for the escalation of Tier 1 payments up to the sixth consecutive month of a noncompliance, capping the Tier 1 payment level for that specific noncompliance for the consecutive months of noncompliance beyond six months. The CLECs argued that escalation should continue after six months, rising as necessary to succeed ultimately in inducing Qwest to perform up to standards.

The facilitator determined it was not so clear that continuation of poor performance past six months means there was a methodical calculation by Qwest that the continuing cost of compliance exceeded the continuing cost of violation. It would be

speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been solidly believed sufficient to improve performance, but proved inadequate only as time passed), or even other reasons, caused or contributed to a failure to provide compliant performance. The facilitator recommended that if it can be shown that six months of escalations would create payment levels that can generally be judged to be far enough in excess of both the value of harm to CLECs and the costs of calculating decisions to continue to under perform, then we should consider reasonable a six-month cutoff of escalation. This conclusion is all the more appropriate in light of factors that there are provisions for root cause analyses of continuing, substantial problems; there exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances; and there exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated providers of utility services, such as Qwest, satisfy their service obligations.

The NDPSC agrees with the facilitator's conclusions and recommends that the QPAP should include the provisions for the escalation of Tier 1 payments up to the sixth consecutive month of a noncompliance, capping the Tier 1 payment level for that specific noncompliance for the consecutive months of noncompliance beyond six months.

***(iv) Splitting Tier 2 Payments between CLECs and the States***

Covad proposed a splitting of Tier 2 payments between CLECs and the states. Qwest responded that Covad's position was based upon a misreading of the Colorado Special Master's report from that state. The facilitator agreed that the Colorado report does not support a division of Tier 2 payments between the states and CLECs. The facilitator recommended that Tier 1 payments under the QPAP are adequately compensatory for CLECs. Those CLECs that conclude otherwise may retain their rights to damage recovery through other actions. The facilitator recommended that the goals of the Tier 2 payments are best served by continuing to provide that they be paid to the state.

The NDPSC recommends that Tier 2 payments not be split between CLECs and the states.